In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1659

GENNARO ZANFARDINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court improperly admitted into evidence false exculpatory statements he made to an Assistant United States Attorney prior to arraignment; improperly forbade him to cross-examine a police witness relating to a prior investigation of the witness's official conduct; and improperly admitted into evidence post-conspiratorial statements by his co-defendants relating to a bribe attempt.

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to violate federal narcotics laws, in violation of 21 U.S.C. 846, and sentenced as a second narcotics offender to a term of twenty-five years'

imprisonment and ten years of special parole.[1] The court of appeals affirmed from the bench. An application for rehearing was denied (Pet. App. A).

The evidence showed that petitioner supervised and controlled a major narcotics ring, operating in the Bronx and East Harlem in New York City. Campopiano, petitioner's principal aide, was assisted by Lentini and Abbamonte in directing the daily distribution of large amounts of heroin and cocaine. Dolores Martinez ("Didi") and her husband purchased large quantities of heroin and cocaine from petitioner's organization, which they in turn distributed throughout Harlem. Didi was arrested in December 1972 and began cooperating with federal and local authorities. During this period she continued making large purchases of narcotics from petitioner's organization, while under supervision of the authorities. Prior to petitioner's trial, at which Didi was to testify, petitioner, Campopiano, Lentini, Abbamonte, and two others were charged with obstruction of justice, bribery, and conspiracy to do both resulting from a down payment of $100,000 made to two police officers for the destruction of certain evidence and for information concerning Didi's location, which would enable them to kill her.[2]

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[1]Indicted along with petitioner were John Campopiano, Arcadio Boria, Oreste Abbamonte, Thomas Lentini, George Coumoutsos, John Doe, a/k/a "Tommy", Solomon Glover, Benito Cortino, Jane Doe, a/k/a "Diosdada", Jane Roe, a/k/a "Roberta", Sabino Rios, and Joseph Mack. Co-defendant Boria has filed a petition for a writ of certiorari, No. 73-6864.

[2]Following a bench trial in the United States District Court for the Southern District of New York, petitioner was sentenced to fifteen years' imprisonment on the bribery charge to run concurrently with the sentence imposed in the instant case and to five years' imprisonment on the obstruction of justice and conspiracy charges, also to run concurrently with his sentence in this case.

1. Petitioner contends that it was improper for the trial court to admit into evidence certain false exculpatory statements made to an Assistant United States Attorney during a pre-arraignment interview which followed his arrest. Petitioner acknowledges that he was advised of his right to remain silent, but adds that he was told that whatever he said would be used in fixing bail. He contends, therefore, that he was forced to give up his constitutional right to remain silent in order to secure his constitutional right to bail.

Petitioner was interviewed by the prosecutor at approximately 3:00 p.m. on April 14, 1973. The prosecutor first identified himself and apprised petitioner of the charges against him (Tr. 875). He next informed petitioner that he would fix bail in his case. He than advised petitioner as follows: that he had a constitutional right to refuse to answer any of his questions; that he had an absolute right to remain silent and that if he chose to answer any questions, any statements he made could be used against him; that he had a right to consult an attorney and to have that attorney present during the interview; that if he did not have funds to retain an attorney, that an attorney would be appointed to represent him and that he did not have to answer any questions until that attorney was appointed and he could consult with him. After each warning was given, petitioner indicated that he understood his rights. He made no request to consult an attorney or have one appointed for him. The prosecutor then inquired of petitioner whether, understanding his rights as explained, he was willing to provide information pertaining to his background and his version of the facts. Petitioner responded "okay" (Tr. 880-882).

Petitioner then made a number of false exculpatory statements. He denied using heroin, cocaine, marijuana, or pills of any type. He also denied that he had ever worked at, had a key to, or opened or closed the door to the barber shop at 320 Pleasant Avenue with a key (Tr. 880-883).[3] Eleven separate sequences of video tape film taken from the 106 reels of Pleasant Avenue surveillance, showing petitioner opening and closing the door to the subject barber shop, were played for the jury (Tr. 907).

Petitioner was fully advised of his constitutional rights, pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, including his right to remain silent, waived them, and voluntarily made the false exculpatory statements. This interview in no way prevented him from making a full presentation to the magistrate on his bail status. Nothing was said by the prosecutor which suggested that the interview was limited to petitioner's bail status. See *United States* v. *Ramirez*, 482 F. 2d 807, 815-816 (C.A. 2).

Petitioner's reliance on *United States* v. *Kahan*, 479 F. 2d 290 (C.A. 2), reversed and remanded, 415 U.S. 239, and *Simmons* v. *United States*, 390 U.S. 377, is misplaced. Petitioner in this case was not required, as was the defendant in *Simmons*, either to incriminate himself or sacrifice a constitutional right. Petitioner would have secured bail had he made truthful statements. He had no constitutional right to attempt to secure bail on more favorable terms by false pretenses. In reversing the court of appeals in *Kahan* this Court noted that "the incriminating component of respondent's pretrial statements derives not from their content, but from respondent's knowledge of their falsity." 415 U.S. at 243. The situation in the instant case is identical.

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[3]The Pleasant Avenue barber shop was shown to be as the base of operations for petitioner's organization.

2. Petitioner contends that he was improperly denied the right to cross-examine Detective Erwin, a government witness, relative to a prior federal investigation of Erwin.

Erwin's testimony was limited solely to the events relating to the bribe attempt that was the subject of the charges described *supra*, p. 2, n. 2 (Tr. 1094-1097). He was cross-examined briefly and then excused to get some notes (Tr. 1115-1116). Prior to Erwin's resuming the stand the next day, the government revealed to the court and defense counsel that he had on a different occasion been investigated relative to his alleged participation in the receipt of a bribe. It also was disclosed that Erwin had been informed that the investigation was completed and that no action would be taken against him (Tr. 1167).

Defense counsel, outside the presence of the jury, were permitted to examine Detective Erwin on this incident. He testified that fellow officers asked him to participate in the receipt of a $4,000 bribe offered to overlook the arrest of a narcotics violator. After refusing to participate on several occasions, he was ordered by his superior officer to participate. He was given $900 and at the direction of his superior officer used this money to purchase wiretap equipment for the Special Investigation Unit of the Police Department. Detective Erwin further testified that approximately a month and a half before the attempted bribe in this case, he had been informed that his own investigation had been completed and that he had been absolved of any

impropriety. Moreover, he stated that he was not facing any type of departmental censure, trial or investigation (Tr. 1203-1213).[4]

It is well settled that witnesses cannot be impeached by evidence of prior misconduct not resulting in conviction. See, *e.g.*, *United States* v. *Provoo*, 215 F. 2d 531, 536 (C.A. 2); *United States* v. *Bowe*, 360 F. 2d 1, 15 (C.A. 2), certiorari denied, 385 U.S. 961. Inquiry into an arrest or pending indictment is permissible, however, to show bias or motive to testify. Since Erwin was no longer under investigation and had been cleared of any impropriety prior to his participation in the events that he testified about at trial, he lacked any motive to color his testimony in favor of the government. Accordingly, the district court's exclusion of this line of inquiry was proper and in any case was well within the discretion allowed trial judges in such matters. *United States* v. *Miles*, 480 F. 2d 1215 (C.A. 2); *United States* v. *Kahan, supra*, 479 F. 2d at 294-295; *United States* v. *Miller*, 478 F. 2d 1315, 1318-1319 (C.A. 2); *United States* v. *Bonanno*, 430 F. 2d 1060 (C.A. 2), certiorari denied, 400 U.S. 964. See *United States* v. *Blackwood*, 456 F. 2d 526, 530 (C.A. 2), certiorari denied, 409 U.S. 863; *United States* v. *Dorfman*, 470 F. 2d 246 (C.A. 2), certiorari dismissed, 411 U.S. 923.

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[4] The trial judge was asked by defense counsel to inspect *in camera* the files of the United States Attorney's office relative to Erwin's investigation and his City Police Department files to determine if they were inconsistent with his testimony. The trial judge agreed to this procedure and indicated that he would report back on any inconsistency (Tr. 1213, 1313-1317, 1539). He examined the files, and later reported that there were no inconsistencies (Tr. 1317, 1647, 1693-1694).

3. Finally, petitioner asserts that post-conspiratorial hearsay declarations of co-conspirators Campopiano, Abbamonte and Lentini, made out of his presence, but relating to the bribery plot, were improperly admitted.

Contrary to petitioner's assertion, these statements, admitted to show consciousness of guilt, were not received against him. Moreover, petitioner was not named in the declarations by his co-conspirators (Tr. 919-931, 934-935). His involvement was brought out only by the direct testimony of Detective Del Corso as to petitioner's actions and statements (Tr. 932, 933, 936). Thus this case does not present the constitutional infirmity found in *Bruton* v. *United States*, 391 U.S. 123, where a conviction was reversed because a hearsay declaration of a co-conspirator included allegations as to the defendant's conduct.

When petitioner objected to the admission of the declarations against him, the trial judge agreed and gave a specific cautionary instruction. His instruction stated (Tr. 978):

> There is no agency concept in connection with any of these activities.
>
> You are to consider Detective Del Corso's testimony with respect to Mr. Campopiano only as to that which he did or said and you are to consider with respect to Mr. Zanfardino only that which he he did or said. In other words, the activities of one defendant cannot be considered as the actions of or as binding upon the other. [5]

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[5] The remainder of this instruction dealt with the limited purpose for which the bribery plot evidence was being received.

This instruction was given just prior to the receipt of the $100,000 in evidence when the trial judge considered it could have its greatest impact (Tr. 972). No objection was made after it was given. Moreover, the essence of this cautionary instruction was repeated in the closing charge to the jury (Tr. 1947-1948).

Even had the hearsay declarations been admitted against petitioner, however, he would have no grounds for complaint.

Evidence of the suppression or destruction of evidence or of attempts to influence witnesses is admissible to show consciousness of guilt. *Barcott* v. *United States*, 169 F. 2d 929, 932 (C.A. 9), certiorari denied, 336 U.S. 912; *United States* v. *Katz*, 78 F. Supp. 435, 438 (M.D. Pa.), affirmed, 173 F. 2d 116 (C.A. 3); *Harney* v. *United States*, 306 F. 2d 523, 533 (C.A. 1), certiorari denied *sub nom. O'Connell* v. *United States*, 371 U.S. 911. See 2 Wigmore, *Evidence*, § 278 (3d ed., 1940). Similarly, evidence of participation in a conspiracy to carry out such actions is also admissible, even though it constitutes evidence of another crime. *People* v. *Terry*, 57 Cal. 2d 538, 565-566, 370 P. 2d 985, 1001-1002, certiorari denied, 375 U.S. 960; *Commonwealth* v. *Marion*, 232 Pa. 413, 423, 81 Atl. 423, 426; *Perfect* v. *State*, 197 Ind. 401, 410-412, 141 N.E. 52, 55. See 22A C.J.S. Criminal Law, § 633 n. 31 (1961).

In this case, the evidence was clear that petitioner not only adopted the initial bribe offers made by Campopiano and Abbamonte out of his presence, but that he took control of the plot that they had initiated. It was he who gave the final assurance that the $100,000 would "be there", who directed that the witness had "to go" (Tr. 931-932), and who approved the middleman

for the transfer of this money (Tr. 935-936). See *Lutwak* v. *United States*, 344 U.S. 604; *Anderson* v. *United States*, No. 73-346, decided June 3, 1974, slip op. 7-8. See also *United States* v. *Culotta*, 413 F. 2d 1343 (C.A. 2), certiorari denied, 396 U.S. 1019.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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